No. 03-801

Supreme Court, U.S.
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In The

Supreme Court of the United States

SAM REED, Secretary of State of Washington,

Petitioner,

v.

DEMOCRATIC PARTY OF WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Washington State requires the Democratic Party to accept as a Democratic candidate for partisan office any registered voter who desires to run. Washington further requires the Democratic Party to accept as its general election nominee the candidate who receives the most votes in a blanket primary.

Should Washington's blanket primary be subjected to strict scrutiny in light of *California Democratic Party v. Jones*, 530 U.S. 567 (2000)?

PARTIES

The parties to the proceeding below were correctly identified by the State in its Petition with the following exceptions:

Respondents: "Vivan Caver" should be "Vivian Caver." "Ted Highley" should be "Ted Higley."

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STATEMENT

This case was brought under 42 U.S.C. § 1983 to enforce the right of association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

The case arises from Washington State's continuing requirement that the Democratic Party's general election candidate must be selected by means of a blanket primary despite this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000) ("*Cal. Dem. Party*").

Washington contends that its blanket primary is materially different from the California blanket primary reviewed by this Court in *Cal. Dem. Party*. After review of the State's arguments, the Ninth Circuit found Washington's blanket primary to be materially indistinguishable from the California blanket primary and applied strict scrutiny as required by *Cal. Dem. Party*. None of the interests identified by Washington State were found to be compelling. *Washington State Democratic Party v. Reed*, 343 F.3d 1198, 1204-07 (9th Cir. 2003). Accordingly, the Ninth Circuit declared Washington's blanket primary unconstitutional.

The State does not challenge the Ninth Circuit's conclusion that Washington's blanket primary fails strict scrutiny. Petition for a Writ of Certiorari ("Petition") at n.13. The sole issue presented by this case is whether the Ninth Circuit erred in concluding that Washington's blanket primary should be subjected to strict scrutiny.

The Ninth Circuit generally set forth the material facts in its opinion. 343 F.3d at 1201-02. The following

material supplements the Ninth Circuit description with respect to matters raised by the State in its Petition.

1. The History of the Blanket Primary in Washington

a. Washington's Blanket Primary Was Engrafted Upon a Party Nomination System

In 1907 Washington adopted a direct primary law, requiring political parties to select their candidates by public primary. Political parties could require oaths of support for the party and its candidates as a condition to receiving a party ballot. The political parties objected to the imposition of the primary. Washington's Supreme Court upheld the direct primary, ruling that political parties were not protected by the Constitution and that "a law will not be held to be unconstitutional, although in its workings it may destroy these organizations." *State ex rel. Zent v. Nichols*, 97 P. 728, 732 (Wash. 1908).

In 1935, Washington created the nation's first blanket primary system. The State repealed the portions of its direct primary law which allowed parties to limit participation in their primaries to supporters of their party and abrogated the use of primary ballots that listed the candidates of only one party in favor of a common ballot that allowed a voter to go back and forth between party primaries on an office by office basis. The primary process remained a party nomination process, albeit one in which the parties were forced to let non-adherents participate:

> Chapter 26, *supra*, cannot be considered as the adoption of the "non-partisan" system in the nomination and election of public officers. It simply provides a method by which voters can nominate *candidates to run as the nominees of the*

> *various parties* at the general election, without being compelled to disclose the political affiliation of the voters and without limiting the right of the voter to participate in the primary of one party only.

(ER 1199 (September 9, 1935 Opinion of Attorney General of Washington) (emphasis added).)

b. Prior Challenges to Washington's Blanket Primary

A Republican voter challenged the constitutionality of the new blanket primary law but his challenge was rejected, again on the basis that the Constitution did not protect political parties. *Anderson v. Millikin*, 59 P.2d 295, 296-97 (Wash. 1936) (citing *Zent*).

In 1980, after this Court explicitly recognized a First Amendment right of association, a faction[1] of the Democratic Party in Washington again challenged the blanket primary. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). The Washington Supreme Court acknowledged that its holding in *Anderson* would need to be re-examined in light of the now-recognized constitutional right of association. 611 P.2d at 1257. Nevertheless, the court again rejected the challenge to the blanket primary, this time on the basis that no evidence of a burden upon associational rights had been introduced. 611 P.2d at 1258. The Washington Supreme Court decided *Heavey* before this Court

[1] The Democratic Party was implementing a substantial reorganization at the time. Some of the difficulties involved in the implementation are described in *Marchioro v. Chaney*, 442 U.S. 191 (1979).

held in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), that the right of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122.

After the *Cal. Dem. Party* decision in 2000, the Democratic Party renewed its objections to Washington's blanket primary. The State continues to use its partisan blanket primary and forced the Democratic Party to accept nominees selected by the blanket primary in 2001, 2002 and 2003.

2. The Determination of the Constitutionality of the Blanket Primary in *California Democratic Party v. Jones* Was Based Upon the Operation and Effect of Washington's Blanket Primary

In 1996 California adopted a blanket primary system modeled on the Washington State blanket primary. Political parties challenged the constitutionality of the blanket primary. Defenders of the blanket primary submitted evidence of the effects of a blanket primary on political parties and their communications with the public. The source of much of this evidence was Washington's experience with its blanket primary. *See, e.g., California Democratic Party v. Jones*, 984 F. Supp. 1288, 1298 n.24 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000) (based on Washington's experience with its blanket primary, cross-over voting rarely influences the outcome of a party's primary); *id.* at 1298 (based on Washington's experience with its blanket primary, as to the election for any particular office approximately 10% of the voters are cross-over voters, excluding independents, and the figure may rise to 20-25%); *id.* at 1298 (all but

approximately 25-33% of the voters cross over at least once while voting the blanket primary ballot); *id.* at 1300 n.29 (political parties are strong in Washington despite blanket primary and hence California political parties would suffer little diminution as a result of blanket primary).

Based upon this evidence about the operation and effect of Washington's blanket primary on political parties, the district court declared that the burden placed upon the First Amendment right of association by California's blanket primary was significant but not severe and held the blanket primary constitutional. *California Democratic Party*, 984 F. Supp. 1288, 1297-1301, 1303 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). The Ninth Circuit agreed, adopting the district court opinion as its own. *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000). This Court granted certiorari and Washington State was granted leave to file a brief as *amicus curiae* in support of the blanket primary.

The State of Washington advised the Court:

> In considering the Political Parties' challenge to California's blanket primary system, the district court had the advantage of receiving substantial evidence concerning the actual effect of a long-standing blanket primary system on political parties. Such evidence quite properly informed the judgment of the district court and similarly serves to inform the judgment of this Court. . . . [T]hat evidence was drawn from the experience of Washington with its blanket primary system. . . .

Brief of the States of Washington and Alaska as Amici Curiae in Support of Respondents at 2-3 ("Amicus Brief"),

California Democratic Party v. Jones, 530 U.S. 567 (2000) (No. 99-401). After review and argument, this Court determined that the blanket primary imposed a severe burden upon the First Amendment right of association, requiring that it survive strict scrutiny, and referred again to evidence of the experience of political parties under the blanket primary in Washington State. *California Democratic Party v. Jones*, 530 U.S. 567, 577-82 (2000). After evaluating the interests asserted by California and the *Amici* as justifying the burden placed upon the right of association, this Court found none of them to be compelling. *Id.* at 582-85.[2]

3. The Record in This Case Also Showed Severe Burden From Washington's Blanket Primary on Political Parties Including Dilution of Party Members' Votes, Changes in Candidate Behavior, and Alteration of the Party's Message

The State experts in this case reconfirmed the effects of Washington's blanket primary that had been noted in *Cal. Dem. Party*.[3] Adulteration of the party candidate selection process occurs under Washington's blanket primary:

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[2] The asserted State interests reviewed by the Court in its *Jones* opinion included several interests asserted by the State of Washington in its *Amicus* brief. Amicus Brief at 13-16.

[3] References to "ER" are references to the Excerpts of Record in the Ninth Circuit. The district court accepted evidence from the State's experts in connection with the political parties' motions for summary judgment. This evidence is the basis of the factual assertions in this Statement with regard to the blanket primary's impact.

> . . . [C]ross over voting does occur under the blanket primary system in Washington State . . . it is somewhat surprising that one-quarter to one-third of voters cast their primary votes within one party column only.

(ER 1024 (Statement of David J. Olson[4]).) The dilution of the votes of party adherents was characterized as the "price to pay" for having a blanket primary. (ER 1010-11 (Declaration of David J. Olson); *cf.* ER 0579-80 (Deposition of Todd Donovan) (rate of participation of non-party members increases under blanket primary system).)

Cal. Dem. Party called "obvious" the proposition that "these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful." *Cal. Dem. Party*, 530 U.S. at 578. This obvious proposition is true in Washington as well as California. "[T]he priorities of the party faithful . . . have a pronounced ideological tilt to them that is at odds with rank-and-file voters." (ER 1025 (Declaration of David J. Olson).) Organizations such as the Grange, which intervened in this case to defend the blanket primary, have interests that diverge from the views of the party members whose primaries are invaded under the blanket primary system. (ER 1072.) One of the purposes of Washington's blanket primary law was to enable voters to form ad hoc political associations to cross party lines in the primary. *Reed*, 343 F.3d at 1206.

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[4] Professor Olson provided evidence of the impacts of Washington's blanket primary in *Cal. Dem. Party* as well. *See, e.g.*, 169 F.3d at 656-7, n.24 and n.29.

Party candidates change their message because of Washington's blanket primary:

> Because candidates under the blanket primary have to appeal not only to their own party identifiers, but also independents and opposite party identifiers, candidates have incentives to craft and offer messages that appeal to the median voter. . . .

(ER 1025.)

> The messages of candidates in a closed primary, regardless of its temporal proximity to the general election, are most likely to be significantly different than the messages of candidates in a blanket primary.

(ER 0638.) The blanket primary results in the selection of general election nominees who are philosophically less distinguishable from each other than would occur if each party's nominee was selected by voters from that party and, in some cases, are different from the nominees who would be selected in a primary where participation was limited as required by Party rules. (ER 0626-27; 1025-26; 0634-35.)

4. Concession by State Officials of the Unconstitutionality of Washington's Blanket Primary and the Proceedings Below

In the aftermath of this Court's decision in *Cal. Dem. Party*, Washington election officials conceded that

Washington's primary election system is unconstitutional[5] but indicated that they were compelled to follow state law until the State Legislature modified it.[6] The Washington Democratic Party and several of its members brought this action for declaratory and injunctive relief on the eve of the 2000 primary. (ER 00001-0031.) The district court entered a stipulated preliminary injunction that barred use of the blanket primary after the pending 2000 primary and deferred further court action until after the 2001 regular Session of the Washington State Legislature. (ER 0068-76.) The Legislature failed to modify the blanket primary system and the political parties pursued their remedies in federal court. In response, the State asserted that a constitutional primary could not be conducted under existing law and that the case was about the details of, rather than the need for, injunctive relief. (ER 0197-98; ER 0221-26.)

The district court nevertheless dissolved the preliminary injunction and set the case for trial. (ER 0392-407.) Thereafter, the State abandoned its prior position with respect to the constitutionality of Washington's blanket primary. In its place, the State argued that Washington's blanket primary was materially different from California's

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[5] *See, e.g.*, Statement by Secretary of State Ralph Munro, as reported by the Everett Herald, that "[if] [the political parties] sued us, obviously we'd lose the case." The Secretary admitted giving the quote in answering the Democratic Party's complaint in this case. (ER 00009-10, ¶ 36 (Complaint) and ER 0081-82, ¶ 36 (Answer).)

[6] (ER 0030-31 (July 11, 2000 letter from Secretary of State Ralph Munro to Paul Berendt of the Washington State Democratic Central Committee); ER 0222-23 (Declaration of Secretary of State Sam Reed).)

because under Washington's primary system the public, not the major political parties, nominated the party candidates who would appear on the general election ballot.[7] The district court accepted the State's new argument as a defense of the blanket primary, but the Ninth Circuit rejected it:

> As for the State of Washington's argument that the party nominees chosen at blanket primaries "are the 'nominees' not of the parties but of the electorate," that is the problem with the system, not a defense of it. Put simply, the blanket primary prevents a party from picking its nominees.

343 F.3d at 1204. The Ninth Circuit found that:

> . . . under [*Cal. Dem. Party*], the Washington blanket primary system is materially indistinguishable from the California blanket primary system and is unconstitutional unless the defendants bear their burden of demonstrating that it is "narrowly tailored to serve a compelling state interest."

343 F.3d at 1204.

After analysis of the interests asserted by the blanket primary's defenders, the Ninth Circuit concluded that the

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[7] The State's current view of Washington law leads to a constitutionally suspect result. Washington separates political parties into two classes: "major" and "minor." *See* section 5a *infra*. The two classes have different nominating procedures. As the State now characterizes its blanket primary law a minor political party is allowed to nominate candidates until the party begins to be successful enough to be a major party. Petition at 14. Then, as a major party, it is stripped of the right to nominate, thus allowing the nascent party to be hijacked, and its potentially successful message to be distorted, by non-adherents.

defenders of the blanket primary had not borne their burden and declared Washington's blanket primary unconstitutional.

5. Misstatements in Petition

a. Blanket Primary Winners Are Party Nominees

The Petition incorrectly states "Washington law does not describe candidates qualifying for the general election as party nominees." Petition at 12-13.

Political parties in Washington are divided by statute into "Major" political parties and "Minor" political parties. The nomination processes of the two kinds of parties are subjected to different regulation. Minor political parties are permitted to nominate their candidates by convention. Wash. Rev. Code § 29.24.020.[8] Major political parties are required to nominate their candidates through the blanket primary. Wash. Rev. Code § 29.18.010; Wash. Rev. Code § 29.30.095; Wash. Rev. Code § 29.30.101; and Wash. Rev. Code § 29.18.200. A major political party is "a political party of which at least one nominee for President, Vice-President, United States Senator, or a statewide office received at least five percent of the total vote cast at the last preceding general election. . . ." Wash. Rev. Code § 29.01.090. The State in its petition summarizes this statute to avoid highlighting its reference to a nominee of

[8] With the exception of statutes from Title 42 of the Revised Code of Washington, all Washington statutes that are cited in this brief are reprinted in full in the Appendix to the Petition, pp. 85a-99a. Statutes from Title 42 cited in this brief are reprinted in full in the Appendix to this Opposition.

the party, substituting the phrase "candidate designating a party" for "political party of which at least one nominee." Petition at n.11.

Major political parties are permitted to fill vacancies on their general election ballot tickets. Pursuant to Washington law, a vacancy in a major party ticket occurs when "no person has filed for nomination as the candidate of that major political party." Wash. Rev. Code § 29.18.150. The State Petition omits the reference to "nomination as the candidate of that political party," and summarizes the statute as saying that a major political party can fill a vacancy that occurs "if no one designating that party files for a partisan office." Petition at 15. Major political parties can also fill vacancies caused by the death or disqualification of "any candidate or nominee of a . . . political party" before the general elections. Wash. Rev. Code § 29.18.160. The State Petition does not mention the provision for filling vacancies caused by the death or disqualification of a "nominee of a . . . political party," and summarizes this statute as saying that a party can fill vacancies caused by the death or disqualification of "a candidate for partisan office." Petition at 15.

Washington statutes make clear that nominees selected by the blanket primary represent parties, not the electorate in general. When a vacancy due to death or disqualification is filled after certification of the original candidate or nominee has occurred, the secretary of state must certify the name of the person appointed to fill the vacancy, "the office for which he is a candidate or nominee, [and] the party he represents. . . ." Wash. Rev. Code § 29.18.160.

Washington courts similarly recognize the winner of the blanket primary as the Party's nominee. *See Becker v. County of Pierce*, 890 P.2d 1055, 1056 (Wash. 1995) ("In the . . . 1992 primary election, Nina Becker and Brian Sonntag were . . . vying to be the nominee of the Democratic Party. . . ."); *Kitsap Republican Central Committee v. Huff*, 620 P.2d 986, 990 (Wash. 1980) (if convicted of crime, primary winner loses his right to be the "Democratic Party's nominee"); *Knowles v. Holly*, 513 P.2d 18, 23 (Wash. 1973) ("[T]he purpose of the primary is to designate party nominees. . . .").

b. Party Affiliation Is Authorized in Washington and Officially Recognized by the State

The State's Petition at note 2 asserts that Washington statutes do not authorize voters to affiliate with political parties. Similarly, at page 16 of its Petition the State asserts that Washington "takes no official notice of party membership." Both assertions are incorrect. Washington statutes recognize political parties and give them all powers inherent in such an organization. Wash. Rev. Code § 29.42.010. By the State's own admission, the party affiliation of voters who run for office determines whether they will advance to the general election. Petition at 13. State law limits appointments to boards and commissions based upon partisan affiliation – a concept difficult to implement if voters are not authorized to affiliate with political parties and inconsistent with the State failing to take official notice of party membership. *See, e.g.*, Wash. Rev. Code § 42.17.350(1) (no more than three members of Public Disclosure Commission may come from the same political party).

c. Washington's Blanket Primary Bears No Resemblance to the Non-Partisan Blanket Primary Described in Cal. Dem. Party

The State's Petition at note 7 incorrectly suggests that its blanket primary is constitutionally similar to the nonpartisan blanket primary described by the Court in *Cal. Dem. Party* because in neither system are the voters choosing the party's nominees. The Court's system and Washington's system are dramatically different. In the Court's system the voters are choosing among candidates who have been previously nominated by each political party. *Cal. Dem. Party*, 530 U.S. at 598, n.8 (Stephens, J., dissenting) ("[U]nder the Court's reasoning . . . [the State has the option] . . . to have what the Court calls a 'nonpartisan primary' . . . in which candidates previously nominated by the various political parties and independent candidates compete."). Unlike the system described by the Court, in Washington, political parties must accept any candidate who files and prevails in the blanket primary as their nominee. As the Ninth Circuit found, Washington's blanket primary injects non-adherents into the party candidate selection process and "prevents a party from picking its nominees." 343 F.3d at 1204.

REASONS FOR DENYING THE PETITION

The Petition should be denied for the most basic reason: The Ninth Circuit correctly applied the law and reached the correct result. Moreover, there is no conflict between courts that warrants review and the Ninth Circuit decision is isolated in its effects.

1. The Ninth Circuit Did Not Err

The State bases its request for certiorari on an assertion that the Ninth Circuit proceeded "from the proposition that *Cal. Dem. Party* invalidates the use of the blanket primary in any circumstances." Petition at 16. Contrary to the State's argument, the Ninth Circuit did not immediately conclude that *Cal. Dem. Party* had invalidated Washington's blanket primary, although such a conclusion would have been a reasonable reading of the case. *See, e.g., Cal. Dem. Party*, 530 U.S. at 2420 (Stevens, J., dissenting) (noting the Court's "willingness to invalidate the primary schemes of [Alaska, California and Washington]"). Instead, the Ninth Circuit examined whether there was any material distinction between the Washington and California blanket primaries, found none, and subjected Washington's primary to strict scrutiny. The Ninth Circuit did not err. Its conclusion is supported both by prior statements by the State asserting the constitutional identify of the Washington and California blanket primaries and by the record in this case.

The State of Washington previously urged this Court to treat the two blanket primary election systems as constitutionally identical. This Court, in reaching its decision in *Cal. Dem. Party*, was amply advised about Washington's blanket primary and the Washington Supreme Court's reasoning. The *amicus* brief submitted by Washington in support of California's blanket primary did not disclose any significant constitutional difference between the blanket primary systems of Alaska, California, and Washington. Washington's *amicus* argued that California's primary was constitutional because Washington's blanket primary does not severely burden the associational rights of political parties. Amicus Brief at 16-18.

Washington's *amicus* acknowledged that blanket primary systems (such as Washington's) restrict political parties' associational interests in candidate nomination but argued that doing so was not a severe burden because the parties had other rights that could be exercised. *Id.* at 20. The *amicus* brief directed the Court to the Washington Supreme Court's analysis of alleged compelling interests served by Washington's blanket primary. *Id.* at 14. Washington's *amicus* even quoted the Washington Supreme Court's reasoning to support Washington's assertion to this Court that the blanket primary was precisely tailored to the compelling interests of Alaska, California and Washington. *Id.* at 22-23.

Washington asserted in its *amicus* in *Cal. Dem. Party* that there was no significant constitutional difference between its blanket primary and California's:

> . . . [T]he essential premise of [the Political Parties'] challenge to blanket primary election systems applies well beyond this case. The premise of the Political Parties' argument, and the basis for the constitutional defect that they allege infects blanket primary election systems, is that the states may not allow non-party members to vote in primary elections, because only party members are entitled to choose the party's "standard bearer."

Amicus Brief at 9. Washington acknowledged in its *amicus* that, if the Court agreed with the Political Parties in respect to the California primary, it would be deciding the validity of all blanket primary systems generally. *Id.* at 24.

Based upon evidence of the actual effects of Washington's blanket primary upon political parties in Washington, this Court in *Cal. Dem. Party* held:

> In sum, [the blanket primary] forces petitioners to adulterate their candidate-selection process – the "basic function of a political party" – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome . . . of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. [The blanket primary] is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82 (citation omitted).

Washington's blanket primary has not changed since Washington submitted its *amicus*. The State's own evidence in this case shows that the blanket primary interferes in the party's choice of messengers and the message the party delivers. *See* section III *supra*.

Washington argued to the Ninth Circuit that its blanket primary should not be subjected to the same strict scrutiny that this Court imposed upon California's blanket primary because two distinctions existed between the Washington and California primaries. The Ninth Circuit carefully considered the distinctions that Washington asserted existed between its blanket primary and California's – that no party nominees are selected in Washington and Washington has no party registration – and concluded that these were "distinctions without a [constitutional] difference." *Reed*, 343 F.3d at 1203-4.

It was not error for the Ninth Circuit to reject Washington's arguments. Washington's argument that its primary does not burden rights of association because the people, not the party, select nominees associated on the ballot with the party is circular and does not address the

substance of the constitutional burden. The State cannot unilaterally make severely burdensome interference constitutionally permissible by deciding during pending litigation to simply label the result of its interference the nominee of the people rather than a nominee of the party. The State has no right to change a party's message by forcing it to associate with candidates on the general election ballot who have been selected in violation of party rules, whether or not those candidates are labeled "nominees." Moreover, Washington's argument is simply not true. It is blatantly contradicted by Washington statutory and case law and political history. *See* section 5a *supra*.

The Ninth Circuit also correctly concluded that the absence of party registration in Washington did not mean that voters in Washington have no party preferences. The State's expert, Dr. Olson, advised the district court that:

> A recent survey of voter identification with parties reveals that in Washington State there is close parity between Republican and Democratic party identifiers and those calling themselves independent in Washington are nearly identical with those who similarly label themselves nationally.[9]

(ER 1023.) The Ninth Circuit found that the right of these party adherents to select their nominee was thwarted by

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[9] The testimony of Dr. Todd Donovan on behalf of the State was similar: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (ER 0801.)

Washington's blanket primary. Dilution of the votes of party adherents and alteration of the message of party candidates was conceded by State experts. *Supra* at section 3. The Ninth Circuit correctly concluded that the burden placed upon the right of association of party adherents by Washington's blanket primary is severe.

2. The Ninth Circuit Decision Does Not Conflict With Decisions of Any Federal Court or Washington's Supreme Court and Any Such Conflict Would Be Stale

The State does not assert that the Ninth Circuit decision conflicts with any decision of this Court or any Circuit. The sole conflict asserted by Washington is with decisions of the Washington Supreme Court in 1936 and 1980.

Washington asserts that the Ninth Circuit's decision conflicts with the decisions of the Washington Supreme Court in the 1936 case of *Anderson v. Millikin*, 59 P.2d 295, and the 1980 case of *Heavey v. Chapman*, 611 P.2d 1256.

The Ninth Circuit's decision, like this Court's decision in *Cal. Dem. Party*, was based upon the First Amendment right of association. The *Anderson* case was premised upon the belief that the Constitution provides no First Amendment protection to political parties. This conclusion is not valid, as this Court made clear in *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981), and *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). The Washington Supreme Court itself subsequently recognized that *Anderson* did not resolve constitutional issues related to the blanket primary that were

based on the First Amendment right of association. *Heavey*, 611 P.2d at 1256. There is no conflict between the Ninth Circuit's decision and the Washington Supreme Court's decision in *Anderson* that warrants review by this Court.

The *Heavey* decision was premised, in substantial part, upon the Washington Supreme Court's conclusion that the First Amendment right of association did not extend in political affairs beyond racial discrimination or participation in the electoral process, and that the challenge to the blanket primary before it at that time did not allege racial discrimination or impediment of participation in the electoral process. 611 P.2d at 1156. The Washington Supreme Court decided *Heavey* before this Court announced its decisions in *La Follette; Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Eu v. San Francisco Democratic Central Committee*, 489 U.S. 214 (1989); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); and *Cal. Dem. Party*, all of which extended the First Amendment right of association beyond the only two areas in which the *Heavey* Court believed it relevant. There is no reason to believe that Washington's Supreme Court would today fail to appreciate the extent of the First Amendment right of association and the burden on associational rights imposed by blanket primaries.

Moreover, when it decided *Heavey*, the Washington Supreme Court did not have before it the overwhelming evidence of burden caused by the Washington blanket primary that was submitted to this Court in connection with *Cal. Dem. Party* and that was in the record reviewed by the Ninth Circuit in this case. There is no reason to believe it would have ignored that evidence or, after

reviewing it, reached a different conclusion than this Court about the magnitude of the constitutional burden imposed upon the right of association by Washington's blanket primary.

Finally, Washington State has adopted its presidential preference primary since its Supreme Court decided *Heavey*. As the Ninth Circuit noted, Washington's presidential preference primary requires voters to disclose their political affiliation as a condition of voting in the primary and requires the State to disclose those affiliations to the political parties. Wash. Rev. Code § 29.19.055. *Heavey's* conclusion that Washington has a compelling interest in protecting the party affiliation of its voters is no longer valid (if it ever was) in light of the State's action in adopting the presidential preference primary.

There is no conflict between the Ninth Circuit's decision and the decision of the Washington Supreme Court that warrants review by this Court.

3. The Ninth Circuit Decision Does Not Raise an Issue of Broad Public Import

Washington admits that it is the only state affected by its petition and that "it is unlikely that any conflict will ever develop among the circuits on the proper interpretation of this Court's *Cal. Dem. Party* decision or the general issue of the constitutionality of blanket primaries." Petition at 22-23. Essentially the State seeks review for the purpose of obtaining an advisory opinion for its Legislature to use in crafting a replacement for its existing unconstitutional blanket primary. Petition at n.15.

Both the Ninth Circuit decision in this case and the *Cal. Dem. Party* opinion that the Ninth Circuit used as a road map to make its decision are clear, well-grounded decisions. There is no circumstance presented by this case that warrants the grant of a writ of certiorari.

CONCLUSION

The Ninth Circuit decision is correct. The Petition of the State of Washington for writ of certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX

Statutes

U.S. Const. Amend. XIV, § 1 ..... App. 1
42 U.S.C. § 1983 ..... App. 1
Wash. Rev. Code § 42.17.350 ..... App. 1

U.S. Const. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Wash. Rev. Code § 42.17.350 provides:

(1) There is hereby established a "public disclosure commission" which shall be composed of five members who shall be appointed by the governor, with the consent of the

senate. All appointees shall be persons of the highest integrity and qualifications. No more than three members shall have an identification with the same political party.

(2) The term of each member shall be five years. No member is eligible for appointment to more than one full term. Any member may be removed by the governor, but only upon grounds of neglect of duty or misconduct in office.

(3) During his or her tenure, a member of the commission is prohibited from engaging in any of the following activities, either within or outside the state of Washington:

(a) Holding or campaigning for elective office;

(b) Serving as an officer of any political party or political committee;

(c) Permitting his or her name to be used in support of or in opposition to a candidate or proposition;

(d) Soliciting or making contributions to a candidate or in support of or in opposition to any candidate or proposition;

(e) Participating in any way in any election campaign; or

(f) Lobbying, employing, or assisting a lobbyist, except that a member or the staff of the commission may lobby to the limited extent permitted by RCW 42.17.190 on matters directly affecting this chapter.

(4) A vacancy on the commission shall be filled within thirty days of the vacancy by the governor, with the consent of the senate, and the appointee shall serve for the remaining term of his or her predecessor. A vacancy shall not impair the powers of the remaining members to exercise all of the powers of the commission.

(5) Three members of the commission shall constitute a quorum. The commission shall elect its own chair and adopt its own rules of procedure in the manner provided in chapter 34.05 RCW.

(6) Members shall be compensated in accordance with RCW 43.03.250 and in addition shall be reimbursed for travel expenses incurred while engaged in the business of the commission as provided in RCW 43.03.050 and 43.03.060. The compensation provided pursuant to this section shall not be considered salary for purposes of the provisions of any retirement system created pursuant to the general laws of this state.